No. 17-532

In the
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ of Certiorari to the District Court of Wyoming, Sheridan County

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.

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INTRODUCTION

This case presents the straightforward question of whether Indian treaties mean what they say. In 1868, the Crow Tribe of Indians entered into a treaty with the United States in which the Tribe ceded to the federal government the vast majority of its aboriginal territory, which spanned large swaths of present-day Montana and Wyoming. The Tribe retained a portion of its land for the establishment of the Crow Reservation, which is located in southern Montana on the border between Montana and Wyoming. The Tribe also expressly reserved the right to hunt on the lands it had ceded to the United States. Specifically, the treaty provides that the Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." For well over a century, Crow members relied on that binding language to hunt on off-reservation lands, including in the Bighorn National Forest in northern Wyoming, which is adjacent to the Crow Reservation and was established in 1897 from lands that the Tribe ceded to the United States.

Petitioner Clayvin Herrera is a member of the Crow Tribe who went hunting on the Crow Reservation with other members of the Tribe in January 2014. After spotting a small herd of elk, the group pursued the animals and eventually crossed the state line into the Bighorn National Forest in northern Wyoming. The group shot and killed three elk in that federal forest and carried the meat back to the

Reservation in Montana to help feed their families and other tribal members over the winter.

The state of Wyoming—Respondent here—convicted Petitioner of two crimes under Wyoming law for unlawfully hunting elk in the Bighorn National Forest. Before trial, the Wyoming trial court prohibited Petitioner from asserting his federal treaty right as a defense to prosecution, and a Wyoming appellate court affirmed that decision post-trial. Both courts concluded that the Tribe's 1868 hunting right had been categorically abrogated by Wyoming's admission to the Union in 1890 or, alternatively, by the mere establishment of the Bighorn National Forest in 1897, which ostensibly rendered that federal land no longer "unoccupied." In addition, after *sua sponte* raising the question, the appellate court concluded that, under federal principles of issue preclusion, Petitioner was barred from raising the 1868 Treaty's hunting right because, some two decades earlier, a federal civil suit to which Petitioner was not a party resulted in a determination that the treaty right had been abrogated. *See Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1994), *aff'd*, 73 F.3d 982 (10th Cir. 1995). The Wyoming Supreme Court denied review.

The decision below cannot stand, for nothing has abrogated the hunting right reserved to Petitioner and the Crow Tribe under the 1868 Treaty. The 1868 Treaty never mentions Wyoming's statehood as an event that would terminate the Tribe's hunting right, and the 1890 act of Congress admitting Wyoming into the Union is completely silent on Indian treaty rights. That means Wyoming's statehood could only have

impliedly terminated the Tribe's hunting right, and as this Court made clear in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), Indian treaty rights "are not impliedly terminated upon statehood." *Id.* at 207. Nor did the establishment of the Bighorn National Forest, in and of itself, render that vast land "occupied," thereby extinguishing the Tribe's hunting right. Just the opposite, the presidential proclamation creating the Bighorn National Forest expressly prohibited "entry or settlement" on that land. And the notion that issue preclusion applies here is wrong for any number of reasons, including that *Mille Lacs*, which postdated the *Repsis* case invoked by the court below, changed the legal framework for assessing the validity of Indian treaty rights.

The decision below is therefore profoundly wrong and profoundly unsettling. Affirmance not only would strip a sovereign Indian tribe of a longstanding, treaty-guaranteed right of enormous practical and spiritual significance; it would threaten the rights of numerous other Indian tribes that long ago reserved similar off-reservation protections in their own treaties with the United States. That unjust and far-reaching result is particularly misguided given that the only two parties to the 1868 Treaty—the United States and the Crow Tribe—agree that the Crow's hunting right survived Wyoming's statehood and the establishment of the Bighorn National Forest. This Court should accordingly reverse the decision below and confirm that Petitioner may assert the off-reservation treaty hunting right promised to the Crow Tribe over 150 years ago.

OPINIONS BELOW

The Wyoming Supreme Court's order denying review is unreported but reproduced at Pet.App.1-2. The Wyoming District Court's opinion is unreported but reproduced at Pet.App.3-35. The Wyoming Circuit Court's opinion is unreported but reproduced at Pet.App.36-43.

JURISDICTION

The Wyoming District Court issued its opinion on April 25, 2017; the Wyoming Supreme Court denied review on June 6, 2017; and a petition was timely filed. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

A. Historical and Legal Background

1. The Crow Tribe of Indians originated in Canada and "lived originally as Stone Age hunters." *Montana v. United States*, 450 U.S. 544, 547-48 (1981); Robert H. Lowie, *The Crow Indians* xv (1935) (Lowie). More than 300 years ago, the Tribe migrated to what is now southern Montana and northern Wyoming. *See Montana*, 450 U.S. at 547-48; Joseph Medicine Crow, *From the Heart of the Crow Country* 13 (1992). In its new land, hunting remained central to the Tribe's lifestyle; indeed, the Tribe considered "[h]unting of big game" to be "man's chief task," and "basic for many other aspects of life." Lowie 72.

By the mid-1800s, the westward migration of non-Indian settlers and conflicts between various tribes in the region, including the Crow, led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851. *Montana*, 450 U.S. at 547-48, 557; *see* First Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749 (1851 Treaty) (reprinted in 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 594-595 (1904) (Kappler)).[1] In the 1851 Treaty, "the signatory tribes acknowledged various designated lands as their respective territories." *Montana*, 450 U.S. at 547-48. In particular, the Treaty "identified approximately 38.5 million acres as Crow territory," which spanned Montana and Wyoming. *Id.* at 548. The 1851 Treaty made explicit that "the tribes did not 'surrender the privilege of hunting' ... [on] any of the lands" described. *Id.* (quoting Kappler 595). The United States also promised the signatory tribes $50,000 in merchandise and animals annually for ten years. Kappler 595.

The ensuing years witnessed ever-increasing encroachment by non-Indian settlers on Indian lands and resulting conflicts between non-Indians and Indians. Consequently, in 1867, Congress established the "Great Peace Commission," which was authorized to make treaties with the Indians that would "remove" the causes of conflict and "secure ... frontier settlements," principally by moving Indian tribes to "one or more reservations." *Report to the President by the Indian Peace Commission* 26-27 (Jan. 7, 1868).

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[1] In 1825, the Crow had signed a "friendship" treaty with the United States. Treaty with the Crow Tribe, Aug. 4, 1825, 7 Stat. 266.

In November 1867, the Commission met with Crow leaders. Commission president Nathaniel Taylor explained that, among other things, "the white people are rapidly increasing and are taking possession of and occupying all the valuable lands." Inst. for the Dev. of Indian Law, *Proceedings of the Great Peace Commission of 1867-1868* 86 (1975) (*Proceedings*). Taylor accordingly presented a "plan to relieve [the Tribe] ... from the bad consequences of th[e] state of things and to protect [it] from future difficulties." *Id.* Taylor proposed that the United States would "set apart a tract of your country as a home for yourselves and children forever, upon which your great Father will not permit the white man to trespass" and on which Tribe members would learn to farm. *Id.* at 86-87.[2] The United States would then "buy" the Tribe's remaining land but, Taylor stressed, "leav[e] to [the Tribe] ... the right to hunt upon" that ceded land "as long as the game lasts." *Id.* at 86.

Taylor's proposal was met with skepticism. The Crow leaders noted the federal government's failure to comply with the 1851 Treaty. *See id.* at 88 ("We did not get the goods promised to us[.]"); *id.* at 91 ("You have not kept the promises made to us in the last treaty.").[3] They also emphasized the Tribe's desire to continue hunting rather than commence farming. *See id.* at 88 ("I was raised on game and I would like to live as I was raised.... We want to kill our own game and be glad."); *id.* ("You speak of putting us on a

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[2] "Great Father" referred to the President of the United States. *See Proceedings* 86.

[3] Taylor conceded the point, explaining that the promised goods "were stolen by" government agents. *Proceedings* 91.

reservation and teaching us to farm. We were not brought up to [do] that[.]"). As one explained, "There is plenty of buffalo, deer, elk, and antelope in my country." *Id.* at 91. In response, Taylor reiterated that "[y]ou will still be free to hunt as you are now." *Id.* at 90.

2. Six months later, in May 1868, the United States and the Crow Tribe signed the Second Treaty of Fort Laramie, which was ratified by the Senate and signed by President Andrew Johnson. *See* Treaty with the Crow Indians, May 7, 1868, 15 Stat. 649 (1868 Treaty). The 1868 Treaty resulted in the creation of the Crow Reservation—comprised of approximately eight million acres of the Tribe's aboriginal land—in present-day southern Montana, extending to the present-day border between Montana and Wyoming. *Montana*, 450 U.S. at 548. The Tribe ceded the remainder of its territory, including its land in present-day northern Wyoming, to the United States in exchange for payments, goods, and federal protection of its members and remaining lands. 1868 Treaty, art. IV-XII, 15 Stat. at 650-52; *see also Montana*, 450 U.S. at 547-48.

Consistent with Commissioner Taylor's repeated representations to the Crow leaders, the 1868 Treaty also expressly guaranteed hunting rights for the Tribe beyond the boundaries of the Reservation, including on the land that the Tribe had ceded in present-day Wyoming. Specifically, Article IV of the Treaty provided that while the Tribe would make the new Reservation its "permanent home" and "make no permanent settlement elsewhere," it nevertheless "shall have the right to hunt on the unoccupied lands

of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 15 Stat. at 650.

Over the next half-century, Congress ratified numerous other acts diminishing the size of the Crow Reservation to around 2.3 million acres. *See Montana*, 450 U.S. at 548. In those acts, however, Congress made clear that the rights reserved by the Tribe under the 1868 Treaty, including the off-reservation hunting right, remained intact. *See* Act of April 11, 1882, 22 Stat. 42, 43 (providing that "all the existing provisions of [the 1868 Treaty] shall continue in force"); Act of March 3, 1891, 26 Stat. 989, 1042 (providing that "all existing provisions of the [1868 Treaty] ... shall continue in force"); Act of April 27, 1904, 33 Stat. 352, 355 (providing that "[t]he existing provisions of all former treaties with the Crow tribe of Indians not inconsistent with the provisions of this agreement, are hereby continued in force and effect"); Act of August 31, 1937, 50 Stat. 884, 884 (providing that only those "Acts or parts of Acts in conflict herewith are hereby repealed," without suggesting any impact on Tribe's hunting right).[4]

3. Several months after the United States and the Tribe signed the 1868 Treaty, Congress created the Wyoming Territory. *See* Act to Provide a Temporary Government for the Territory of Wyoming, July 25,

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[4] Similarly, a 1994 law settling a dispute over the Crow Reservation's eastern boundary provided that "nothing in this Act ... shall affect or modify the terms and conditions of the [1868 Treaty]." Crow Boundary Settlement Act of 1994, Pub. L. 103-444, 108 Stat. 4632, 4642.

1868, 15 Stat. 178. Twenty-two years later, in 1890, Congress passed another act formally admitting Wyoming "into the Union on an equal footing with the original States." Wyoming Statehood Act §1, 26 Stat. 222 (1890) (Statehood Act). The Statehood Act said nothing about Indian treaty rights. Among other things, it provided that "the laws of the United States, not locally inapplicable, shall have the same force and effect within [Wyoming] as elsewhere within the United States." *Id.* §21, 26 Stat. at 226.

The Statehood Act also discussed certain land grants that the federal government would make to Wyoming. *See id.* §§4, 6, 8-11, 26 Stat. at 222-24. But as with many new states in the American West, the federal government never ceded title to vast swaths of land in Wyoming. The Statehood Act acknowledged as much, noting "[t]hat the State of Wyoming shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act." *See id.* §12, 26 Stat. at 224; *see also* Wyo. Const. art. XXI, §26 (disclaiming "all right and title to the unappropriated public lands lying within the boundaries thereof"). Among the lands that remained federally owned after Wyoming's statehood were the lands in northern Wyoming that the Crow had ceded to the United States in the 1868 Treaty.

4. In 1891, the year after Wyoming's admission to the Union, Congress enacted a statute—commonly known as the Forest Reserve Act—that authorized the President, by proclamation, to "set apart and reserve ... public land bearing forests" in "any State." Act to Repeal Timber-Culture Laws, §24, 26 Stat. 1095, 1103 (1891) (Forest Reserve Act). Congress

included express anti-abrogation language in the statute, providing that "nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands." *Id.* §10, 26 Stat. at 1099.

In February 1897, pursuant to the Forest Reserve Act, President Grover Cleveland issued a proclamation establishing the "Big Horn Forest Reserve" from federal land in northern Wyoming—*i.e.*, the area constituting the Tribe's aboriginal hunting grounds, which the Tribe had ceded to the federal government in the 1868 Treaty. Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897). The proclamation explicitly "reserved" that land "from entry or settlement," *id.* at 909, and added the following admonition: "Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation," *id.* at 910. By 1908, the reserved land was known as the "Bighorn National Forest," which it remains to this day. *See* Exec. Order No. 908 (July 2, 1908).[5]

5. Between 1868 and 1989, members of the Crow Tribe continuously hunted in the Bighorn National Forest, almost entirely free of state interference.[6] In

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[5] In 1907, Congress changed the nomenclature from "forest reserves" to "national forests." Act of March 4, 1907, 34 Stat. 1256, 1269. No legal consequences attached to this change. For clarity, this brief refers to the "Bighorn National Forest" even when addressing the pre-1907 land.

[6] In 1972, Wyoming prosecuted a Crow member for killing a deer in the Bighorn National Forest. After the member invoked the 1868 Treaty, and the U.S. Department of Interior's Field Solicitor testified that the treaty was "still valid," the state court dismissed the charges. *See* Associated Press, *Crow Indian Cites*

1989, however, Wyoming successfully prosecuted a Crow member, Thomas Ten Bear, for shooting and killing an elk in the Bighorn National Forest without a Wyoming hunting license. In response, in 1992, Mr. Ten Bear and the Tribe filed an action against two state officials in federal district court seeking a declaration that the Tribe maintained its right under the 1868 Treaty to hunt on the "unoccupied lands of the United States"—including in the Bighorn National Forest. *See Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520, 521-22 (D. Wyo. 1994).

The district court granted summary judgment to the state officials exclusively on the ground that the case was controlled by this Court's decision in *Ward v. Race Horse*, 163 U.S. 504 (1896). 866 F. Supp. at 522-24. *Race Horse* involved a materially identical treaty provision that reserved for the Bannock Indians the right to hunt on the "unoccupied lands of the United States." 163 U.S. at 517. This Court concluded that Wyoming's admission to the Union "on equal terms with the other states" abrogated the Bannock's treaty hunting right, *see id.* at 510-15, and that Wyoming's statehood terminated what the Court deemed a "temporary and precarious," rather than "perpetual," hunting right, *id.* at 508-10, 515. The *Repsis* district court acknowledged that "*Race Horse* is a much-criticized decision," that "many courts and commentators have questioned [its] continuing viability," and that "[n]o ... Congressional enactment exists which has explicitly modified relevant portions"

Treaty in Game Rap, *in* The Daily Plainsman, at 9 (Oct. 13, 1972); *Wyoming Game Charges Dropped for Crow Man*, Char-Koosta News, at 6 (Jan. 1, 1973).

of the 1868 Treaty. 866 F. Supp. at 521, 523-24. It nevertheless deemed itself bound by *Race Horse* and held for the state officials. *Id.* at 524.

The Tenth Circuit affirmed. *See Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 992 (10th Cir. 1995). Likewise following *Race Horse*, the Tenth Circuit held that the "Tribe's right to hunt reserved in" the 1868 Treaty was "repealed by the act admitting Wyoming into the Union." *Id.* (citing *Race Horse*, 163 U.S. at 514); *see also id.* at 994 (describing the treaty right as "a temporary right which was repealed with Wyoming's admission into the Union"). Indeed, the court of appeals doubled down on *Race Horse*, declaring it "compelling, well-reasoned, and persuasive." *Id.* at 994.

In a brief "alternative basis for affirmance" on an issue the district court had not reached, the Tenth Circuit stated that the Tribe's hunting right had also been abrogated by the mere establishment of the Bighorn National Forest. *Id.* at 993. In the court's view, when "Congress created the Big Horn National Forest," the land therein was "no longer available for settlement," thereby "result[ing] in the 'occupation' of the land." *Id.* Thus, the court stated, the Bighorn National Forest "ha[s] been 'occupied' since the creation of the national forest in 1887 [*sic*]." *Id.* at 994.

Mr. Ten Bear and the Tribe filed a petition for certiorari challenging the Tenth Circuit's decision, but the Court denied review. *See* 116 S. Ct. 1851 (1996) (mem.).

6. Three years later, this Court held in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), that the principal theory on which *Race Horse*

rested—abrogation of Indian treaty rights upon admission to the Union under the so-called "equal footing doctrine"—was no longer good law. *See id.* at 204-07. The Court also rejected *Race Horse*'s "temporary and precarious" language as "too broad to be useful in distinguishing rights that survive statehood from those that do not," explaining that rights reserved in Indian treaties should continue in force unless a terminating event defined in the treaty has occurred. *Id.* at 206-07. The Court further explained that "[t]reaty rights are not impliedly terminated upon statehood." *Id.* at 207; *see also id.* at 219 (Rehnquist, C.J., dissenting) (stating that the Court "effectively overrules *Race Horse*").

B. Petitioner's Prosecution and Conviction

1. Petitioner Clayvin Herrera is an enrolled member of the Crow Tribe who lives in St. Xavier, Montana, on the Crow Reservation. Pet.App.5. In January 2014, Petitioner and other Tribe members went hunting on the Reservation in Montana. Pet.App.5. As Petitioner later testified, the Tribe was in a "bad" economic state at the time, and his salary as a tribal employee had recently been cut. JA208-09. A single father, Petitioner intended to "get an elk" during the hunt so that he and his three daughters could "eat it"—indeed "[l]ive off it"—in the dead of winter. JA192, 197, 208-09. Petitioner and his companions spotted a small herd of elk on the Reservation and, while pursuing the herd through the snow, crossed the state line into the Bighorn National Forest in Wyoming. Pet.App.5. The group "shot, quartered, and packed" three elk, carried the meat "out of the mountains on the[ir] backs," and "later

distributed the elk meat among their families and other tribal members." Pet.App.5; JA255-56.

After learning about the elk hunt, Wyoming authorities traveled across state lines to the Crow Reservation in Montana to cite Petitioner for two criminal misdemeanors under Wyoming law—one for taking an antlered big game animal without a state license and during a closed hunting season, and the other for being an accessory to the same. Pet.App.5 (citing Wyo. Stat. §§23-3-102(d), 23-6-205).[7]

2. Petitioner moved to dismiss the charges, arguing that the 1868 Treaty allowed him to hunt in the Bighorn National Forest. Pet.App.36-37. The state opposed, contending as relevant here that the treaty hunting right had been categorically abrogated either by Wyoming's statehood or by the establishment of the Bighorn National Forest.

The Wyoming Circuit Court—the trial court—denied Petitioner's motion. Pet.App.36. The court "agree[d]" with the holding in *Repsis* that "Crow Tribe members do not have off-reservation treaty hunting rights." Pet.App.38. The court added that this Court's

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[7] It is undisputed that the Crow Tribe permits January elk hunting on its Reservation (*i.e.*, on the Montana side), JA156-57, and that federal law does not prohibit hunting, including treaty-based hunting, in the Bighorn National Forest, *see, e.g.*, 43 U.S.C. §1732(b); *The Forest Service Welcomes Hunters to the Nation's Forests and Grasslands*, USDA Forest Service, https://bit.ly/2OkEHXC (last visited Sept. 3, 2018). Federal law does prohibit hunting in most national parks, *e.g.*, 16 U.S.C. §256b, but "national forests are to be distinguished from national parks," *United States v. Hicks*, 587 F. Supp. 1162, 1167 (W.D. Wash. 1984). This case does not involve the exercise of treaty hunting rights in national parks.

Mille Lacs decision "had no effect on the *Repsis* decision." Pet.App.39. The trial court canceled a previously scheduled evidentiary hearing and precluded Petitioner from even mentioning his federal treaty right at trial. Pet.App.43.

Petitioner filed an interlocutory appeal with the Wyoming District Court, which was dismissed on jurisdictional grounds. Pet.App.8.[8] Petitioner subsequently sought review and a stay of his trial from the Wyoming Supreme Court, and when that court failed to act, he sought an emergency stay from Justice Sotomayor. *See* Pet.App.9; No. 15A1105. Both the Wyoming Supreme Court and Justice Sotomayor ultimately denied Petitioner's requested relief. *See* Pet.App.9.

A jury convicted Petitioner on both charges. Pet.App.9. Petitioner was ordered to pay $8,080 in fines and court costs, received a one-year jail sentence that the court suspended, and had his hunting privileges suspended in Wyoming for three years. Pet.App.9.

C. The Decision Below

Petitioner again appealed to the district court, arguing that his hunting right under the 1868 Treaty had not been categorically abrogated. Following

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[8] The Wyoming district courts are the state's trial courts of general jurisdiction, but they also serve as the appellate courts to the circuit courts, which have jurisdiction over misdemeanor cases. The district courts are single-judge courts. Review of district court decisions may only be had in the Wyoming Supreme Court. Wyoming has no intermediate appellate court system. *See About The District Courts*, Wyo. Jud. Branch, http://bit.ly/2xd73ik (last visited Sept. 3, 2018).

briefing and oral argument, the district court *sua sponte* requested supplemental briefing on the question of whether issue preclusion barred Petitioner from contending that the treaty hunting right remained valid. Pet.App.10-11.

The district court affirmed. The court first concluded that, as a matter of federal issue-preclusion principles, Petitioner was bound by *Repsis* because (1) "the issue decided in [*Repsis*]"—*viz.*, "the continued validity of the off-reservation treaty hunting right"—"[is] identical with the issue presented in the present action"; (2) the finding of "[t]he federal district court [in *Repsis*]" that "the right was intended to be temporary in nature, and ... was no longer valid" was "necessary to that judgment"; (3) Petitioner is in "privity" with the Crow Tribe, one of the *Repsis* parties; and (4) the Tribe had "a full and fair opportunity to litigate" the treaty right's validity in *Repsis*. Pet.App.13-19.[9] The court rejected Petitioner's argument that *Mille Lacs* "constitutes an intervening change in the applicable legal context since *Repsis* was decided" that would defeat issue preclusion. Pet.App.20; *see also* Pet.App.24 (stating that "the legal framework is unchanged").

The district court also announced a decision on the merits "if [issue preclusion] did not apply." Pet.App.31. The court explained that, in *Race Horse*, this Court had concluded that "the rights granted in"

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[9] The court's decision principally used the term "collateral estoppel," but this Court has observed that the term "issue preclusion" is preferable. *See Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 n.1 (2016). This brief accordingly uses the term "issue preclusion."

the nearly identical Bannock treaty "were temporary in nature" and "were not intended to survive Wyoming['s] statehood." Pet.App.32. "Similarly," the court continued, *Repsis* "found that 'the [Crow] Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union,'" and "alternatively held that the treaty rights were no longer valid, because 'the creation of the Big Horn National Forest resulted in the "occupation" of the land.'" Pet.App.32-33. Those conclusions, the district court determined, were "appropriate," and it was thus "proper" to deem the treaty right abrogated. Pet.App.34.[10]

Petitioner filed a petition for review with the Wyoming Supreme Court, which was denied without explanation. Pet.App.1-2.

After Petitioner sought this Court's review, the Court called for the views of the Solicitor General. In response, the Solicitor General advised that in the view of the United States—the counterparty to the 1868 Treaty—neither Wyoming's admission to the Union nor the creation of the Bighorn National Forest abrogated the Crow Tribe's hunting right under the Treaty. *See* U.S. Cert. *Amicus* Br.8, 12.

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[10] The circuit court had concluded that, even if Petitioner possessed a treaty hunting right, "the state of Wyoming may regulate that right in the interest of conservation." Pet.App.39. Petitioner appealed that determination, but because the district court "conclude[d] that the treaty rights are not valid," it did not "reach the conservation necessity issue." Pet.App.25 n.7; *see also* Pet.App.14 n.3 (deeming it "unnecessary to address the conservation necessity issue" because "the treaty rights do not exist"). Accordingly, that issue is not before this Court.

SUMMARY OF ARGUMENT

The 1868 Treaty provides that members of the Crow Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." That language does not remotely suggest that Wyoming's admission to the Union would terminate the Tribe's treaty hunting right, and neither the Wyoming Statehood Act nor any other act of Congress subsequently abrogated the Tribe's right. The mere establishment of the Bighorn National Forest, moreover, did not render the Tribe's aboriginal hunting lands "occupied" so as to abrogate the right. The Wyoming District Court's decision holding the treaty right categorically abrogated is demonstrably wrong, and affirming it would have dramatic consequences for the Crow and numerous other tribes that possess similar reserved treaty rights. The doctrine of issue preclusion that the Wyoming District Court raised *sua sponte* does not compel a different result.

I. Wyoming's admission to the Union did not abrogate the Crow's off-reservation hunting right. The text of the 1868 Treaty identifies four events that could terminate that right: (1) the lands become occupied; (2) the lands cease to be owned by the United States; (3) game is no longer found on the lands; or (4) peace no longer subsists between the Tribe and non-Indians. Wyoming's statehood—indeed, the establishment of any state—is conspicuously absent from that list. The negotiations preceding the Treaty, its historical context, and the practical construction

given to it by its parties confirm that Wyoming's statehood was never considered an event that would abrogate the hunting right. Likewise, the Wyoming Statehood Act contains no indication of Congress' intent to abrogate the right. To be sure, in 1896, this Court held in *Race Horse* that Wyoming's statehood abrogated a reserved hunting right in a virtually identical provision in another Indian treaty. But a century later, this Court repudiated *Race Horse* in *Mille Lacs*, holding that statehood does not impliedly terminate Indian treaty rights and that the focus should be on those events specified by the treaty as terminating a reserved right. Because Wyoming's statehood is not one of the rights-terminating events specified in the 1868 Treaty, Wyoming's admission to the Union did not abrogate the Tribe's hunting right.

Nor did the mere establishment of the Bighorn National Forest render the Tribe's aboriginal hunting land "occupied" so as to abrogate the treaty right. The text, historical record, and practical construction of the 1868 Treaty adopted by the parties show that the term "occupied" entailed actual, physical settlement of the land by non-Indian settlers. President Cleveland's 1897 proclamation establishing the Bighorn National Forest did not, by the stroke of a pen, suddenly result in that vast forestland becoming populated with non-Indian settlers. Quite the opposite: The proclamation expressly "reserved from entry or settlement" the land comprising the forest, and it warned "all persons not to enter or make settlement upon" the land. If anything, the creation of the Bighorn National Forest accomplished precisely the opposite of "occupation," both as a matter of ordinary English and as the parties to the 1868 Treaty understood that term. Regardless,

as a matter of law, President Cleveland's proclamation could not have abrogated the Crow's treaty right, because the authorizing statute disclaimed any intent to change, repeal, or modify any Indian treaties.

Affirming the decision below would have far-reaching consequences. For more than a century, the Crow Tribe correctly understood the 1868 Treaty to reserve an off-reservation hunting right that extends into northern Wyoming and the present-day Bighorn National Forest. Eliminating that right not only violates a promise made to a sovereign Indian tribe by the United States; it vitiates a hunting tradition of enormous practical and spiritual significance to the Crow. Furthermore, numerous other Indian tribes have treaties with the United States reserving hunting or similar rights, including on unoccupied, open, or unclaimed lands of the United States. If the decision below is affirmed, there is no principled reason why those rights should survive either the admission of other states into the Union or the creation of other national forests.

II. The doctrine of issue preclusion does not bar Petitioner from addressing the validity of the 1868 Treaty right. A prior judgment lacks preclusive effect when there has been a change in the applicable legal context. Here, both courts in the prior *Repsis* litigation relied exclusively on this Court's decision in *Race Horse* to hold that Wyoming's statehood abrogated the Tribe's treaty right. Following *Repsis*, however, this Court decided *Mille Lacs*, which plainly changed the applicable legal context governing the relevant issue here, *viz.*, the validity of Indian treaty rights.

Likewise, there is no basis for finding preclusion based upon the Tenth Circuit's self-styled "alternative" determination that the treaty right was abrogated by the establishment of the Bighorn National Forest. The Restatement (Second) of Judgments, which this Court routinely consults on issue-preclusion matters, provides that "alternative" determinations decided in the first instance and not affirmed on appeal do not enjoy preclusive effect given the higher likelihood of error of such determinations—a concern fully realized here given the Tenth Circuit's legally, factually, and logically flawed analysis of the "occupied" question. Moreover, in *Repsis*, the state did not even raise the argument that the forest's creation rendered the lands "occupied" until its response brief before the Tenth Circuit, thus depriving the Tribe of the full and fair opportunity to litigate the question that is necessary for issue preclusion to attach.

Applying issue preclusion would require the Court to create new law that is both far-reaching and fraught with constitutional implications. It would require the Court to determine whether, and under what circumstances, a tribal member can be bound by prior decisions involving his or her tribe, a consequential issue the Court has never addressed. It would also require the Court to approve the use of offensive issue preclusion by a state against a criminal defendant, which the Court has been reluctant to endorse even in cases involving a prior criminal judgment, as opposed to the prior civil judgment here. Because both of these issues implicate constitutional concerns, the Court's usual practice of avoiding the unnecessary resolution of constitutional questions further counsels against applying issue preclusion

here. Instead, the Court should squarely address and reject the atextual and ahistorical notion that the hunting right enshrined in the 1868 Treaty was abrogated by Wyoming's admission to the Union or the establishment of the Bighorn National Forest.

ARGUMENT

I. The Crow Tribe's Hunting Right Under The 1868 Treaty Has Not Been Abrogated.

"A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) (*Fishing Vessel*). The "starting point" in interpreting an Indian treaty is the treaty language itself. *Mille Lacs*, 526 U.S. at 206. This Court has long held that, under the Indian canons of construction, Indian treaty language must "be interpreted liberally in favor of the Indians, and any ambiguities are to be resolved in their favor." *Id.* at 200 (citations omitted); *see also, e.g.*, *Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (describing canons as "deeply rooted in this Court's Indian jurisprudence"); *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-53 (1832). Indian treaty language may not be given an "artificial meaning" that "might be given to it by the law and by lawyers." *Seufert Bros. Co. v. United States*, 249 U.S. 194, 199 (1919). Rather, courts must interpret an Indian treaty's words "in the sense in which they would naturally be understood by the Indians." *Fishing Vessel*, 443 U.S. at 676.

In addition to the treaty's text, courts "may look ... to the history of the treaty, the negotiations, and the practical construction adopted by the parties" to deduce its meaning. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). And although Congress may abrogate Indian treaty rights through a later-enacted statute, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *South Dakota v. Bourland*, 508 U.S. 679, 693 (1993). Thus, "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202.

A straightforward application of these principles establishes that the off-reservation hunting right contained in the 1868 Treaty between the United States and the Crow Tribe has not been abrogated. In particular, neither Wyoming's 1890 admission to the Union nor the 1897 establishment of the Bighorn National Forest abrogated the treaty hunting right.

A. Wyoming's Admission to the Union Did Not Abrogate the Crow Tribe's Treaty Right.

1. Wyoming's admission to the Union in 1890 plainly did not abrogate the Crow's treaty hunting right. The relevant text of the 1868 Treaty—the clearest indicator of its meaning—provides that the Tribe "shall" have the continuing "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the

hunting districts." 1868 Treaty, art. IV, 15 Stat. at 650. The language of the 1868 Treaty therefore "itself defines the circumstances under which the right[]" to hunt beyond the boundaries of the Crow Reservation "would terminate," *Mille Lacs*, 526 U.S. at 207: (1) the land ceases to be "unoccupied"; (2) the land is no longer owned by "the United States"; (3) "game" is no longer "found thereon"; and (4) "peace" no longer "subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV, 15 Stat. at 650. Wyoming's statehood is conspicuously absent from that list. Simply put, "[t]here is no suggestion in the Treaty"—much less the unambiguous language required by the Indian canons of construction—"that the [hunting right] ... should end when a State was established in the area." *Mille Lacs*, 526 U.S. at 207.

The "negotiations" over the 1868 Treaty, *Choctaw*, 318 U.S. at 432, reinforce the textual reading. In discussions preceding the Treaty, Commissioner Taylor twice represented to Crow leaders that the Tribe could continue to hunt on the ceded land. *See* pp.6-7, *supra*. Although he identified some limits—*e.g.*, "as long as the game lasts"—Commissioner Taylor never so much as hinted that the Crow's ability to hunt would end if and when the land became part of a state.[11]

The "larger context that frames" the 1868 Treaty demonstrates further that neither the United States nor the Crow intended Wyoming's admission to

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[11] Taylor undoubtedly knew that statehood was a possibility. In the preceding ten years, four surrounding states that included former Indian land (Kansas, Nebraska, Nevada, and Oregon) had been admitted to the Union.

terminate the hunting right. *Mille Lacs*, 526 U.S. at 196. When the parties negotiated and agreed to the 1868 Treaty, Wyoming was not even a *territory* yet. Unsurprisingly, the 1868 Treaty never mentions the term "Wyoming," even while explicitly referencing two other U.S. territories: the Dakota Territory (where the Crow and the United States signed the 1868 Treaty) and the Montana Territory (the future location of the Crow Reservation). *See* 1868 Treaty, preamble & art. II, 15 Stat. at 649-50. Moreover, even while acknowledging those two territories, the 1868 Treaty does not reference the terms "statehood," "state," "Union," or any variation thereof. That the "entire" 1868 Treaty "is devoid of any language expressly mentioning[,] much less abrogating," the Crow Tribe's hunting right upon the admission of *any* territory to the Union—including the Dakota and Montana Territories—underscores that the Tribe's hunting right did not vanish upon Wyoming's admission to the Union. *Mille Lacs*, 526 U.S. at 195.

Nor does the 1890 Wyoming Statehood Act indicate that Congress intended to abrogate the Tribe's treaty right. The Statehood Act provides that "the State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever." 26 Stat. at 222. "This language, like the rest of the Act, makes no mention of Indian treaty rights; it provides no clue that Congress considered the reserved rights of the [Crow Tribe] and decided to abrogate those rights when it passed the Act." *Mille Lacs*, 526 U.S. at 203; *see also Bourland*, 508 U.S. at 693. In fact, this language is materially identical to the language in

Minnesota's 1858 statehood act, which this Court examined in *Mille Lacs*. *See* 526 U.S. at 203. Accordingly, what was true in *Mille Lacs* is no less true here: "There is no ... 'clear evidence' of congressional intent to abrogate the [Crow] Treaty rights" in the Statehood Act—or in any other congressional act, for that matter. *Id.*

Finally, that the Crow Tribe's treaty hunting right survived Wyoming's admission to the Union accords with the "practical construction" of that right that has been "adopted by the parties" to the Treaty. *Choctaw*, 318 U.S. at 432. In the views of both the United States and Tribe, "[t]he Tribe's treaty rights ... survived Wyoming's statehood." U.S. Cert. *Amicus* Br.9-10; *see also* Crow Tribe Cert. *Amicus* Br.20. In sum, all relevant canons of Indian treaty jurisprudence point to a single conclusion: Wyoming's admission to the Union did not abrogate the Tribe's treaty hunting right.

2. "With no direct support for [the] argument" that Wyoming's statehood abrogated the treaty hunting right, *Mille Lacs*, 526 U.S. at 203, the Wyoming District Court adopted the reasoning from the *Repsis* case, which in turn relied exclusively on this Court's 1896 decision in *Ward v. Race Horse* to hold that Wyoming's statehood abrogated the right. As this Court has understood *Race Horse*, however, that decision does not support the atextual and ahistorical proposition that Wyoming's admission to the Union abrogated the Crow's 1868 Treaty right.

In *Race Horse*, this Court examined a provision of an 1869 treaty between the Bannock Tribe and the United States, which reserved for that tribe "the right

to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts," 163 U.S. at 507—*i.e.*, a provision worded almost identically to Article IV of the Crow Tribe's 1868 Treaty. This Court held that the hunting right did not survive Wyoming's admission to the Union. *See Mille Lacs*, 526 U.S. at 206.

The "first part of the holding" in *Race Horse*, *id.* at 203, relied on the "equal footing doctrine," the principle that new states "are endowed with powers and attributes equal in scope to those enjoyed by the states already admitted," *Race Horse*, 163 U.S. at 514-15. One of those "powers," *Race Horse* explained, is the power "to regulate the killing of game within their borders." *Id.* at 514. In the *Race Horse* Court's view, the Bannock's hunting right stood in "irreconcilable" conflict with Wyoming's inherent authority to regulate game. *Id.* Therefore, the Court held, the Bannock's hunting right had been impliedly "repeal[ed]" by Wyoming's subsequent statehood. *Id.*

In the second "part of the holding" in *Race Horse*, *Mille Lacs*, 526 U.S. at 206, the Court concluded that Wyoming's admission to the Union impliedly repealed the treaty right because that right was not intended to exist beyond Wyoming's statehood, *see Race Horse*, 163 U.S. at 515-16. The Court reached that determination by describing the hunting right at issue as "temporary and precarious," rather than "perpetual." *See id.* at 510 (noting the "temporary and precarious nature of the right"); *id.* at 515 (stating that "the privilege given was temporary and precarious").

In 1999, this Court in *Mille Lacs* thoroughly repudiated *Race Horse*'s reasoning. The Mille Lacs Band of Chippewa Indians and several of its members had brought suit against the state of Minnesota seeking a declaration that they retained hunting rights under an 1837 treaty between several Chippewa Bands of Indians and the United States. 526 U.S. at 185. That treaty preserved for the Chippewa the "privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" by those Indians to the United States. *Id.* at 177. Relying on *Race Horse*, Minnesota contended that its admission to the Union in 1858 terminated those Indian treaty rights. *Id.* at 202-03.

The Court resoundingly rejected that argument, declaring that "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." *Id.* at 205. More broadly, the Court held, Indian "[t]reaty rights are not impliedly terminated upon statehood." *Id.* at 207.

Turning to *Race Horse*'s first line of reasoning, the Court explained that *Race Horse*'s invocation of the "equal footing doctrine" relied on the "false premise" that treaty-protected hunting rights "conflict[] irreconcilably with state regulation of natural resources." *Id.* at 204. On the contrary, the Court explained, those two interests are entirely "reconcilable": States may regulate treaty-protected hunters, but only when doing so is necessary as a "conservation" measure. *Id.* at 204-05 (citing *Fishing*

Vessel and *Antoine v. Washington*, 420 U.S. 194, 207-08 (1975)).

The Court next rejected *Race Horse*'s additional rationale that the "temporary and precarious" hunting right was "not intended to survive statehood." The Court held that "the 'temporary and precarious' language in *Race Horse* is too broad to be useful in distinguishing rights that survive statehood from those that do not." *Id.* at 206. As the Court observed, "any right created by operation of federal law could be described as 'temporary and precarious,' because Congress could eliminate the right whenever it wished." *Id.* at 207. In short, "the line suggested by *Race Horse* is simply too broad to be useful as a guide to whether treaty rights were intended to survive statehood." *Id.*

Instead, the Court explained, the "focus" must be on those conditions or events that Congress intended to serve as "termination point[s]" abrogating treaty rights. *Id.* That inquiry in turn requires examining what the "[t]reaty itself defines" as "the circumstances under which the rights would terminate." *Id.* For example, the Court observed, the treaty provision in *Race Horse* "contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States; the happening of these conditions was 'clearly contemplated' when the Treaty was ratified." *Id.* (quoting *Race Horse*, 163 U.S. at 509).

The Court did not suggest that the treaty in *Race Horse* identified Wyoming's statehood as an event of abrogation. Quite the contrary: The Court admonished that "there is nothing inherent in the

nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood." *Id.* The Court further explained that *Race Horse*'s "decision to the contrary"—*viz.*, that the treaty rights in that case "were impliedly repealed by Wyoming's statehood"—was "informed by" that decision's erroneous belief "that Indian treaty rights were inconsistent with state sovereignty over natural resources and thus that Congress ... could not have intended the rights to survive statehood." *Id.* at 207-08.

The principal *Mille Lacs* dissent repeatedly asserted that the majority had "effectively overrule[d] *Race Horse sub silentio*." *Id.* at 219 (Rehnquist, C.J., dissenting); *see also id.* at 220. Courts and commentators have overwhelmingly agreed with this assessment. *See, e.g.*, *State v. Buchanan*, 978 P.2d 1070, 1083 (Wash. 1999) (en banc) ("[T]he United States Supreme Court effectively overruled *Race Horse* in *Minnesota v. Mille Lacs*."); Robert T. Anderson, *Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather After ANCSA*, 33 Alaska L. Rev. 187, 203 n.111 (2016) (deeming *Race Horse* "now discredited"); Hon. William C. Canby, Jr., *American Indian Law in a Nutshell* 524 (6th ed. 2014) (observing that *Mille Lacs* "squarely rejects" *Race Horse*); Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 Idaho L. Rev. 475, 551 n.473 (2005) (noting that "*Race Horse* and its progeny have been effectively abrogated" by *Mille Lacs*). In the nineteen years since *Mille Lacs*, this Court has never again cited *Race Horse*.

3. In light of *Mille Lacs*, the "effectively overrule[d]" and "discredited" *Race Horse* decision does not support the proposition that Wyoming's admission to the Union abrogated the Crow's treaty right. Because neither the 1868 Treaty nor the Statehood Act—nor any other act of Congress—provides or even suggests that Wyoming's admission to the Union would or did abrogate the treaty right, the only conceivable way that Wyoming's statehood could have repealed the Tribe's hunting right is by implication, which *Mille Lacs* conclusively rejects. *See* 526 U.S. at 207 (holding that "reserved treaty rights" cannot "be extinguished by *implication* at statehood"). Moreover, after repudiating the "temporary and precarious" framework for characterizing treaty rights, the Court made clear that the proper focus should be on whether specific treaty language "define[d] the circumstances under which the rights should terminate." *Id.* And while the *Race Horse* treaty did contain express language terminating a hunting right upon the occurrence of certain specified events—as the Court in *Mille Lacs* noted, *see id.*—the fact is that Wyoming's statehood was not one of those events. The same thing is true with respect to the materially identical treaty at issue here: Nothing in the 1868 Treaty provides that Wyoming's statehood would bring the Tribe's hunting right to an end.

The Wyoming District Court provided no other rationale for concluding that Wyoming's admission to the Union abrogated the Crow's treaty hunting right. Its decision relied exclusively on *Repsis*, which relied exclusively on *Race Horse* as "conclusively establish[ing]" that the hunting right preserved in the 1868 Treaty was a "temporary right" that was

"repealed with Wyoming's admission into the Union." 73 F.3d at 994; *see also id.* at 992 (holding that "[t]he Tribe's right to hunt reserved in the [1868 Treaty] was repealed by the act admitting Wyoming into the Union"). *Mille Lacs* rejects that reasoning across the board, from the proposition that statehood abrogates treaty-based hunting rights under the "equal footing doctrine," to the notion that "temporary and precarious" treaty rights that terminate upon *certain* explicitly identified events *ipso facto* also impliedly terminate upon a state's admission to the Union. Because Wyoming's statehood is not one of the rights-terminating events specifically enumerated in the 1868 Treaty, and because no other congressional act, including the Statehood Act, provides that Wyoming's statehood would terminate Indian treaty rights, Wyoming's admission to the Union did not abrogate the Crow Tribe's hunting right.

B. The Establishment of the Bighorn National Forest Did Not Abrogate the Crow Tribe's Treaty Right.

The Wyoming District Court provided just one other basis for categorically abrogating the Tribe's treaty right to hunt in the Bighorn National Forest: That vast swath of land—which all agree constituted "unoccupied lands of the United States" when the 1868 Treaty was ratified—became "occupied" merely upon being declared a national forest in 1897. Pet.App.21-22. In so holding, the court relied solely on the Tenth Circuit's decision in *Repsis*, which observed that because the land comprising the Bighorn National Forest was "no longer available for settlement," the establishment of the forest "resulted in the

'occupation' of the land." 73 F.3d at 993. That reasoning "sounds absurd, because it is." *Sekhar v. United States*, 570 U.S. 729, 738 (2013). The text of the 1868 Treaty, the historical record, and the practical construction adopted by the parties all confirm what common sense already suggests: The mere creation of the Bighorn National Forest, through a proclamation that expressly prohibited "all persons" from making "entry or settlement" on that land, did not suddenly render that land "occupied" and terminate the Crow's treaty hunting right.

1. The 1868 Treaty does not define "occupied" or "unoccupied," but its text indicates that both parties would have understood the term "occupied" as akin to physical settlement. The Treaty repeatedly links the notions of "occupation" and "settlement." For example, it provides that the Crow Reservation would be established for the "occupation of" Tribe members, and that all others generally could not "settle upon" that land. Art. II, 15 Stat. at 650. On the new land they would be "occup[ying]," Tribe members would be "settlers"; every member over the age of four who "settled permanently upon said reservation" would receive rations "for the period of four years after he shall have settled upon said reservation." Art. VI ¶4, IX ¶6, 15 Stat. at 651-52. And, of course, in exchange for agreeing to "make no permanent settlement elsewhere," the Crow retained the right to hunt "on the unoccupied lands of the United States," Art. IV, 15 Stat. at 650, a provision that indicates that "occupied" lands would be those where others eventually made their "settlement." Particularly for Indians with limited to no command of the English language—much less legal terms of art—these passages strongly

suggest that for purposes of the 1868 Treaty, the term "occupied" was considered synonymous with "settled," and "unoccupied lands" meant lands that were not settled. *See Fishing Vessel*, 443 U.S. at 676.

Other textual clues demonstrate that "unoccupied lands" meant lands that were not just unsettled, but unsettled by non-Indians. Article IV provides that the Crow's right to hunt on "the unoccupied lands of the United States" would last "as long as peace subsists among the whites and Indians on the borders of the hunting districts." Art. IV, 15 Stat. at 650. It is undisputed that the "hunting districts" comprised the land ceded by the Crow. *See* JA234. Article IV thus indicates that the "hunting districts" encompassed off-reservation lands where "the whites" had not settled, for "the whites" were located on the opposite side of "the borders of the hunting districts," *i.e.*, the ceded land. If "the whites" eventually settled within the borders of the hunting districts, those tracts of land would become "occupied," but while the districts remained unsettled by "the whites," the land would remain "unoccupied lands."

Negotiations preceding the 1868 Treaty underscore that "occupied" lands meant lands physically settled by non-Indians. *See Choctaw*, 318 U.S. at 432. During his November 1867 discussions with Crow tribal leaders, Commissioner Taylor explained that "the white people are rapidly increasing and ... occupying all the valuable lands." *Proceedings* 86. A Crow leader, Black Foot, agreed that "[w]e are being surrounded by the whites." *Id.* at 88. Indeed, the physical "occupation" of Crow territory was a principal reason why the federal government

advocated the establishment of a Crow Reservation in the first place: On that land, the federal government could better ensure that "the white man" would not "trespass." *Id.* at 86. Thus, the parties to the 1868 Treaty employed an understanding of the term "occupied" that connoted the actual, physical presence of non-Indian settlers.

The post-1868 historical record lends further support to that understanding. In 1869, during consideration of an appropriations bill fulfilling the United States' obligations under the 1868 Treaty, Senator Harlan (a former Secretary of the Interior, which housed the Office of Indian Affairs) explained that the 1868 Treaty permitted the Crow "to hunt, so long as they can do so without interfering with the settlements." Cong. Globe, 40th Cong., 3d Sess. 1348 (1869). "So long as outside lands, outside of the reservation, may not be occupied by settlements, and may be occupied by game," Senator Harlan continued, the Crow "may hunt the game." *Id.* In 1873, Felix Brunot—the Chairman of the Board of Indian Commissioners—echoed that interpretation during negotiations to purchase additional land from the Tribe. As Brunot explained to the Tribe, under "article fourth" of the 1868 Treaty, "the Crows" retained the right to hunt game "where there are not too many whites." U.S. Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1873* 135 (1874). He continued, "[t]he treaty says ... as long as the white men are not here ... with farms, [the Crow] may go there and hunt." *Id.* at 132.

Finally, while Indian interpretive canons caution against giving treaty language an "artificial meaning" that "might be given to it by the law and by lawyers," *Seufert Bros.*, 249 U.S. at 199, contemporaneous dictionaries defined the term "occupy" in a manner consistent with the historical record. One legal dictionary, for example, explained that the term "occupy" "[i]mplies actual use" or "cultivation by a particular person," and that the term "settle" means "to occupy ... land." William C. Anderson, *A Dictionary of Law* 725, 944 (1889). Another explained that "[s]ettlers and occupants, within the meaning of [a public land use law] ... , are those who resided personally on the public land in question, or who occupy and use it." 2 Benjamin Vaughan Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence* 197-98 (1879). Those definitions mirror the modern-day distinction between "occupied" and "unoccupied." *See, e.g.*, *American Heritage Dictionary of the English Language* 1956 (1992) (defining "occupy" as "to dwell or reside in" and defining "unoccupied" as "not inhabited").

2. The foregoing evidence confirms the common-sense point that the mere establishment of the Bighorn National Forest in 1897 did not render that vast land "occupied" so as to abrogate the Crow Tribe's treaty hunting right. The Crow and the United States considered "occupied" to be synonymous with physical settlement, particularly by non-Indians. President Cleveland's proclamation creating the Bighorn National Forest did not suddenly result in that entire land being populated by non-Indian settlers. Quite the contrary: The proclamation expressly "reserved from entry or settlement" the land comprising the

forest, and it warned "all persons not to enter or make settlement upon" the land. Proclamation No. 30, 29 Stat. at 909-10. By barring "entry or settlement" on the reserved land, the proclamation accomplished just the opposite of "occupation," both as a matter of ordinary English and as the parties to the 1868 Treaty understood that term. Indeed, it is difficult to imagine how the proclamation could have rendered the land any more *unoccupied* than by prohibiting anyone from "enter[ing] or mak[ing] settlement upon" it.

In holding otherwise, the Wyoming District Court relied solely on the Tenth Circuit's *Repsis* decision, which observed that the mere creation of the Bighorn National Forest rendered the land "occupied." 73 F.3d at 993. That perplexing conclusion, however, was the product of a host of errors, of both omission and commission.

As an initial matter, the *Repsis* court did not even attempt to discern what "unoccupied lands" meant to the parties to the 1868 Treaty, particularly the Crow. The court engaged in no examination of the Treaty's text, its negotiations, or its history; in fact, it engaged in no treaty interpretation at all, much less interpretation consistent with the Indian canons of construction. As a result, the court failed to recognize that the treaty parties understood "unoccupied lands" essentially to mean those that non-Indians had not physically settled.

Furthermore, the court acknowledged that, in 1868, the land later comprising the Bighorn National Forest was "unoccupied" and "open for settlement." *Id.* It then reasoned that once the land was "no longer available for settlement," it became "occupied." But as

a matter of logic, land that is "unoccupied" does not become "occupied" by a *prohibition* on settlement. And as a matter of the historical record, the parties to the 1868 Treaty understood the event that would terminate the Tribe's hunting rights, *Mille Lacs*, 526 U.S. at 207, to be actual, physical settlement of the Tribe's aboriginal hunting grounds—not a sort of metaphysical "occupation" by non-settlement.

Emblematic of—and likely contributing to—its cursory and haphazard legal analysis, the Tenth Circuit also got key facts wrong, stating that "Congress created" the Bighorn National Forest "in 1887." *Repsis*, 73 F.3d at 993; *see also id.* at 994 (reiterating that the forest was created "in 1887"). In fact, in *1891*, Congress enacted the Forest Reserve Act, which gave the *President* the power to create forest reserves. Pursuant to that statute, in *1897*, President Cleveland (not Congress) created the Bighorn National Forest. Additionally, in asserting that the forest's creation rendered the land "occupied," the court cited federal law enacted three months *after* its creation. *Id.* at 993 (citing Act of June 4, 1897, 30 Stat. 11, 35-36).

Quite apart from the fact that the parties to the 1868 Treaty would not have understood the mere creation of a national forest to render the hunting ground "occupied," the proclamation establishing the Bighorn National Forest could not, as a matter of law, have abrogated the Tribe's hunting right. President Cleveland's "power, if any, to issue" the proclamation must have stemmed "either from an act of Congress or from the Constitution itself." *Mille Lacs*, 526 U.S. at 188-89. When President Cleveland established the

Bighorn National Forest, he did so pursuant to the Forest Reserve Act. *See* Proclamation No. 30, 29 Stat. at 909. In that statute, Congress gave the President authority to "set apart and reserve" any "public land[s] bearing forests." Forest Reserve Act, §24, 26 Stat. at 1103. But Congress also made crystal clear that "nothing in this act shall change, repeal, or modify any ... treaties made with any Indian tribes." *Id.* §10, 26 Stat. at 1099. Congress thus explicitly *barred* the President from abrogating Indian treaty rights when creating national forests pursuant to the Forest Reserve Act. So even if President Cleveland had intended to render the Crow Tribe's hunting grounds "occupied" via his proclamation—*sub silentio*—he lacked the legal authority to do so. *See Swim v. Bergland*, 696 F.2d 712, 717 (9th Cir. 1983) ("reject[ing]" argument that Forest Reserve Act gave the President "the power to *extinguish* Indian treaty rights"); *cf. Mille Lacs*, 526 U.S. at 189-90 (concluding that 1830 Removal Act did not authorize presidential order terminating Chippewa hunting rights).

But there is no need to ascribe such motives to President Cleveland. Prohibiting "entry or settlement" on land simply does not cause that land to become "occupied." And there is no evidence that the Crow Tribe or the United States—or anyone—thought otherwise when the 1868 Treaty was ratified or when the Bighorn National Forest was established.

To be sure, none of this means the federal government is barred from administering specific tracts of lands in the Bighorn National Forest in such a manner that the Crow signatories to the 1868 Treaty would have understood to render those lands

"occupied." But this case does not involve a claim that specific parts of the forest are "occupied," much less in a manner within the meaning of the 1868 Treaty. In particular, Wyoming's claim is not that the small area of the forest that Petitioner entered comprises "occupied lands" but other portions of the forest do not. Rather, Wyoming's claim—which the decision below accepted—is that the mere ***establishment*** of the Bighorn National Forest immediately rendered the *entire* 1.1-million-acre forest "occupied." Nothing in law or logic supports that sweeping conclusion.

Finally, neither party to the 1868 Treaty considers the Bighorn National Forest's creation to have abrogated the hunting right. The United States has never suggested that the mere legal act of creating a national forest "occupies" land or otherwise extinguishes Indian treaty rights there. Just the opposite: The U.S. Forest Service expressly recognizes that "[m]any" Indian treaties contain "off-reservation treaty rights," including "rights to hunt," and that these rights may be exercised on "ceded lands that are within the boundaries of present day National Forest System lands." U.S. Forest Serv., U.S. Dep't of Agric., *Forest Service Manual* §1563.8b(1) (2016). And in this very case, the United States has agreed with the Crow Tribe that "the creation of the Bighorn National Forest, in and of itself, did not render those lands occupied." U.S. Cert. *Amicus* Br.12; *accord* Crow Tribe Cert. *Amicus* Br.22-23. As with Wyoming's admission to the Union, therefore, the "practical construction" that the 1868 Treaty's parties have given to that agreement confirms that the establishment of the Bighorn National Forest did not abrogate the Crow's treaty right. *Choctaw*, 318 U.S. at 432.

C. Affirming the Decision Below Would Have Far-Reaching Consequences.

If this Court were to hold that Wyoming's admission to the Union or the creation of the Bighorn National Forest abrogated the hunting right reserved in the 1868 Treaty, the implications would be dramatic. For well over a century, Crow members like Petitioner understood the 1868 Treaty to reserve an off-reservation hunting right, including the right to hunt on unoccupied federal land in northern Wyoming. That hunting right not only embodies a promise repeatedly made to the Tribe by the United States; it ensures that the Tribe's members may maintain a traditional practice of subsistence hunting that is foundational to their identity and well-being. Indeed, the lands comprising the Bighorn National Forest constitute the Tribe's "sacred hunting grounds according to Crow oral tradition." Timothy P. McCleary et al. Cert. *Amici* Br.10-11. Consequently, affirming the decision below would do far more than simply strip the Tribe of a treaty-guaranteed right—though that harm alone would itself be an affront to the dignity of a sovereign people whose peaceful relationship with the United States dates back some 200 years, *see* n.1, *supra*, and who have endured more than their fair share of broken promises, *see* p.6 & n.3, *supra* (describing failings of 1851 Treaty). It would also eliminate a hunting tradition of immense practical and spiritual significance.

But the problems with affirmance run deeper still. No fewer than nineteen other Indian tribes, in their own treaties with the United States, have also preserved off-reservation hunting or usufructuary

rights using language identical or materially identical to the language in the 1868 Treaty—*i.e.*, on "unoccupied lands," "open and unclaimed lands," or "unclaimed lands":

- Treaty with the Eastern Band of Shoshonees and the Bannack Tribe of Indians, art. IV, July 3, 1868, 15 Stat. 673, 674-75 (preserving "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts");
- Treaty with the Navajo Tribe of Indians, art. IX, Aug. 12, 1868, 15 Stat. 667, 670 (preserving "the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase");
- Treaty with the Nez Perce Indians, art. III, June 11, 1855, 12 Stat. 957, 958 (preserving "the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land"); *see also* Treaty with the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, art. III, July 16, 1855, 12 Stat. 975, 976 (same); Treaty with the Yakama Nation of Indians, art. III, June 9, 1855, 12 Stat. 951, 953 (same);
- Treaty with the Qui-nai-elt and Quil-leh-ute Indians, art. III, Jan. 25, 1856, 12 Stat. 971, 972 (preserving "the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands"); *see also* Treaty with Nisqualli, Puyallup, etc., art. III, Dec. 26, 1854, 10 Stat. 1132, 1133 (same);

- Treaty with the Makah Tribe of Indians, art. IV, Jan. 31, 1855, 12 Stat. 939, 940 (preserving "the privilege of hunting and gathering roots and berries on open and unclaimed lands"); *see also* Treaty with the S'Klallam Indians, art. IV, Jan. 26, 1855, 12 Stat. 933, 934 (same); Treaty with the Dwamish, Suquamish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, art. V, Jan. 22, 1855, 12 Stat. 927, 928 (same).
- Treaty with the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, art. I, June 9, 1855, 12 Stat. 945, 946 (preserving "the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens");

Many of these tribes live on Indian reservations adjacent to national forests formed from ceded lands.[12] Accordingly, a decision holding that federal lands become "occupied" simply upon designation as a national forest would cast doubt upon the validity of federal treaty rights upon which numerous other Indian tribes have relied for generations.[13]

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[12] For example, the Navajo Reservation borders the Coconino National Forest, and the Yakama Reservation borders the Gifford Pinchot National Forest.

[13] Those reliance interests are bolstered by the fact that every court to have addressed the issue—except the Tenth Circuit in *Repsis* and the decision below—has concluded that national forests are "unoccupied" or "open and unclaimed" lands. *See State v. Miller*, 689 P.2d 81, 82 n.2 (Wash. 1984); *State v. Stasso*, 563 P.2d 562, 565 (Mont. 1977); *State v. Tinno*, 497 P.2d 1386,

A decision holding that a state's admission to the Union can impliedly abrogate reserved treaty rights—despite no such suggestion in the treaty or the statehood act—would have an even more extraordinary impact. Like the 1868 Treaty, the treaties described above (and many others) do not enumerate statehood as a rights-terminating event. And like the Wyoming Statehood Act, the statehood acts of numerous Western states do not contain language abrogating Indian treaty rights. Accordingly, if Wyoming's admission to the Union abrogated the Crow's reserved hunting right in the 1868 Treaty, there is no principled reason why other states' admissions should not also have abrogated reserved rights in those numerous other treaties—including rights this Court has addressed in previous cases without so much as hinting that they no longer exist. *See, e.g.*, *Fishing Vessel*, 443 U.S. at 661-62.

These far-reaching consequences stand in stark contrast to the minimal burden on Wyoming if this Court reverses the decision below. Wyoming would not lose its authority to regulate hunting within its borders, including within the Bighorn National Forest. Indeed, it would remain able to enforce its hunting regulations against Crow members—including Petitioner—so long as it can prove that those regulations as applied to the Crow satisfy the

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1391 (Idaho 1972); *Confederated Tribes of the Umatilla Indian Reservation v. Maison*, 262 F. Supp. 871, 873 (D. Or. 1966), *aff'd*, 382 F.2d 1013 (9th Cir. 1967); *State v. Arthur*, 261 P.2d 135, 141 (Idaho 1953). Put differently, not one other decision has held that the establishment of a national forest abrogates Indian treaty rights.

"'conservation necessity' standard" and other applicable standards articulated by this Court. *Mille Lacs*, 526 U.S. at 204-05; *see, e.g.*, *Antoine*, 420 U.S. at 207; *Wash. Game Dep't v. Puyallup Tribe*, 414 U.S. 44, 48-49 (1973).[14]

Finally, the significant impact on the Crow Tribe and Native Americans more generally of an affirmance—and the marginal impact on Wyoming of a reversal—should not obscure that upholding the decision below will directly affect whether Petitioner will be able to provide for himself and his family. Not only did Petitioner's sentence suspend his hunting privileges in Wyoming for three years and impose a one-year suspended jail sentence; the decision below forever strips Petitioner of his federally enshrined right to hunt in the Bighorn National Forest. Pet.App.9. As this case makes clear, the extent to which Petitioner can put food on his table during unforgiving Big Sky winters depends in great part on his ability to exercise the off-reservation hunting right reserved in the 1868 Treaty. *See, e.g.*, JA192, 197, 208-09. Instead of upholding that right, however, the court below upheld Petitioner's criminal conviction and sentence, all based on reasoning that does not comport with precedent, canons of construction, historical evidence, the shared understanding of the treaty parties, or common sense. This Court should not tolerate that result.

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[14] As noted, whether Wyoming satisfies these standards is not before this Court. *See* n.10, *supra*.

II. Issue Preclusion Does Not Bar Petitioner From Addressing The Treaty Right's Validity.

In addition to ruling on the merits, the Wyoming District Court concluded that issue preclusion "should apply to preclude Herrera from attempting to relitigate the validity of the off-reservation treaty hunting right" that was "previously held to be invalid" in the *Repsis* case. Pet.App.14, 31. The state apparently considered this subject such a non-starter that it did not raise it at any point during Petitioner's criminal proceedings, addressing it only after the court below *sua sponte* requested supplemental briefing on it. Pet.App.10-11. The court, moreover, proceeded to address the merits regardless. That shared reluctance to rely on issue preclusion was well-advised, as the doctrine, for several reasons, does not apply here.

A. The *Repsis* Courts' Determination that Wyoming's Statehood Abrogated the Treaty Right Is Not Entitled to Preclusive Effect.

Issue preclusion "generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001); *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Federal law governs the preclusive effects of a "federal-court judgment" in a "federal-question case[]." *Taylor*, 553 U.S. at 891.

Under well-established federal law, a prior judgment lacks preclusive effect when there has been

an intervening "'change in the applicable legal context.'" *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (quoting Restatement (Second) of Judgments §28 cmt. *c* (1980)) (brackets omitted); *see also Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362 (1984); *Montana v. United States*, 440 U.S. 147, 161 (1979). After all, "a change or development in the controlling legal principles may make that [prior] determination obsolete or erroneous," and issue preclusion "is not meant to create vested rights in decisions that have become obsolete or erroneous with time." *Comm'r v. Sunnen*, 333 U.S. 591, 599 (1948).

That principle forecloses any attempt to treat the decisions in *Repsis* as binding insofar as they held that the Crow's treaty right was abrogated by Wyoming's admission to the Union. In making that determination, both the federal district court and the Tenth Circuit relied exclusively on *Race Horse*, concluding (in the words of the district court) that the Wyoming Statehood Act "abrogated the treaty-based hunting right" under "the Equal Footing Doctrine," and that the Crow Tribe's "'temporary and precarious'" hunting right "ceased when the land ... came within the authority and jurisdiction of [the] newly-created state [of Wyoming]." 866 F. Supp. at 522-23; *see also* 73 F.3d at 992, 994 (affirming district court on these grounds). Indeed, for good measure, the Tenth Circuit declared *Race Horse* to be "compelling, well-reasoned, and persuasive." 73 F.3d at 994.

There was unquestionably a "change in the applicable legal context" following the *Repsis* decisions. In *Mille Lacs*, this Court firmly held that

the "equal footing doctrine" applied by *Race Horse* did not justify abrogating Indian treaty rights. *See* Pet.App.21. But this Court did not stop there. Having dispensed with the "equal footing doctrine" in this context, the Court went on to specify that "[t]reaty rights are not impliedly terminated upon statehood"; that *Race Horse*'s "temporary and precarious" language was "too broad to be useful in distinguishing rights that survive statehood from those that do not"; and that courts should instead look to the treaty language itself to determine the specific conditions under which treaty rights expire. 526 U.S. at 205-07; *see* pp.28-30, *supra*. As noted, nearly every observer—including the principal *Mille Lacs* dissent, without objection by the majority—has concluded that *Mille Lacs* "effectively overruled" *Race Horse*. *See* p.30, *supra*. But at a minimum, *Mille Lacs* quite obviously constituted "a change or development in the controlling legal principles" concerning Indian treaty rights, *Sunnen*, 333 U.S. at 599, thus defeating any preclusion based on the ground that Wyoming's admission to the Union brought an end to the "validity of the [Crow's] off-reservation treaty hunting right," Pet.App.13; *see also* 18 Wright & Miller, *Federal Practice & Procedure* §4425 (3d ed.) (noting that "Supreme Court clarification of issues that had been debated or uncertain in the lower courts is ... a proper justification for avoiding preclusion").

B. The Tenth Circuit's Alternative Determination in *Repsis* that Creation of the Bighorn National Forest Rendered the Ceded Lands "Occupied" Is Not Entitled to Preclusive Effect.

In its brief opposing certiorari, Wyoming argued that the Tenth Circuit's self-styled "alternative basis for affirmance" in *Repsis*—that the creation of the Bighorn National Forest rendered it "occupied"—is separately entitled to preclusive effect. Br. in Opp. 17-18; *see* 73 F.3d at 993. At the outset, it bears noting that the Wyoming District Court did not base its issue preclusion ruling on that ground, which is hardly surprising given that the state made no such argument before it.[15] Instead, Wyoming asserted that the "issue" for issue preclusion purposes was "the continued validity of the off-reservation treaty hunting right," not the subsidiary question of whether the forest was "occupied" upon its creation. Pet.App.13. If that is the "issue," of course, then Wyoming's effort to invoke preclusion necessarily fails because, contrary to the state's position below, *Mille Lacs* unquestionably changed the relevant law regarding interpretation of Indian treaty rights. *See* pp.28-30, 47-48, *supra*. But even taking at face value Wyoming's belated effort to fashion another basis for preclusion, the state is incorrect for several independent reasons.

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[15] Indeed, in examining issue preclusion, the Wyoming District Court did not even look to the Tenth Circuit's decision, much less that court's "occupation" determination. *See* Pet.App.14 (identifying the "federal district court['s]" adjudication of the Treaty's validity as "necessary to that judgment").

First, the state's reliance on the Tenth Circuit's alternative determination about the establishment of the Bighorn National Forest runs headlong into another exception to issue preclusion. The Restatement (Second) of Judgments, which this Court routinely consults on issue-preclusion questions, *see Bravo-Fernandez v. United States*, 137 S. Ct. 352, 357-58 (2016); *Taylor*, 553 U.S. at 894-95; *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-02 (2001); *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984), provides: "If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is *not* conclusive with respect to *either* issue." Restatement §27 cmt. *i* (emphases added). Because the Tenth Circuit in *Repsis* functioned as a "court of first instance" when opining on the meaning of "unoccupied lands"—a question that the *Repsis* district court had not addressed—its self-styled "alternative" conclusion that the Bighorn National Forest was occupied upon creation should not be given preclusive effect.[16]

This case amply demonstrates the wisdom of the Restatement's rule. As the Restatement explains, "a determination in the alternative may not have been as carefully or rigorously considered as it would have if it had been necessary to the result." *Id.* That perfectly

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[16] Relatedly, because the Tenth Circuit had already *affirmed* the district court's conclusion that Wyoming's statehood abrogated the Crow Tribe's hunting right, its determination regarding "occupied lands" does not enjoy preclusive effect because that issue was not "necessary" or "essential" to its "final outcome." *Bobby*, 556 U.S. at 835.

describes the Tenth Circuit's passing "alternative" determination regarding the "occupied" issue, which was riddled with legal, factual, and logical errors. *See* pp.37-38, *supra*; *Bravo-Fernandez*, 137 S. Ct. at 358 (disapproving issue preclusion "[w]here circumstances suggest that an issue was resolved on erroneous considerations" (citing Restatement §29)). The Tenth Circuit's decision, moreover, was not subject to plenary appellate review, further undermining the "underlying confidence that the result achieved" in that decision "was substantially correct"—a "premise" of preclusion doctrine. *Bravo-Fernandez*, 137 S. Ct. at 358; *cf. Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 647 (2006).[17] And that confidence in a correct result is also "unwarranted" where the "determination relied on as preclusive" is "itself inconsistent with another determination of the same issue." Restatement §29. Here, the Tenth Circuit's inventive determination that the mere establishment of a national forest results in the abrogation of Indian treaty rights is inconsistent with the decisions of numerous other courts. *See* n.13, *supra*.

Second, the Tenth Circuit's determination also is not preclusive because the Crow Tribe lacked a full and fair opportunity to litigate the question of whether the establishment of the Bighorn National Forest rendered that land "occupied." As this Court has

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[17] Because appellate review increases the likelihood of a correct result, the Restatement provides that if an appellate court upholds both independently sufficient determinations, a lower judgment *is* conclusive as to both determinations. Restatement §27 cmt. *o*. But that did not occur with respect to the Tenth Circuit's decision in *Repsis*.

"repeatedly recognized," issue preclusion "cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Allen v. McCurry*, 449 U.S. 90, 95 (1980); *see also, e.g.*, *Taylor*, 553 U.S. at 892. This requirement "is a most significant safeguard." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 328 (1979); *see also Hurd v. District of Columbia*, 864 F.3d 671, 680 (D.C. Cir. 2017) (noting the "general view of courts and commentators" that the "full and fair opportunity" requirement is "among the most critical guarantees of fairness" in applying issue preclusion).

That principle readily applies here. In the proceedings before the *Repsis* district court, the state offered no argument at all that the creation of the Bighorn National Forest resulted in its "occupation." Instead, it argued (in all of two pages) that congressional acts over the past century gradually rendered the forest now "occupied." *See* Summ. J. Br. 6-7, *Repsis*, No. 92-cv-1002 (D. Wyo. Nov. 16, 1992) (contending that "there no longer remains unoccupied lands of the United States"); Reply Br. 7-8, *Repsis*, No. 92-cv-1002 (D. Wyo. Dec. 18, 1992). Given that cursory and off-point analysis, it is hardly surprising that the district court in *Repsis* did not pass on the "occupied" question at all. *See* pp.11-12, 50, *supra*.

Against this background, the Crow's opening brief in the Tenth Circuit focused, naturally enough, solely on the issue that the district court had actually decided: that the Tribe's treaty right ended upon Wyoming's admission to the Union. In its response brief, however, the state suddenly argued—for the

first time in the litigation—that the forest's mere creation rendered it "occupied." *See* Br. for Appellees 21, *Repsis*, No. 94-8097 (10th Cir. Apr. 12, 1995) (asserting that "[t]he public lands that now comprise the Big Horn National Forest have been 'occupied' since its creation in 1887 [*sic*]"). That bolt from the blue left the Tribe with very little opportunity to address the contention. In its remaining reply brief, the Tribe necessarily had to devote the bulk of its limited pages to the issue decided against it by the district court—the same issue to which the state had devoted most of its response brief—leaving little room to address the state's newly raised alternative argument regarding the effect of the national forest's establishment.

That exceedingly narrow window of opportunity—highly limited reply briefing at the appellate level—falls well short of the "full and fair opportunity to litigate" an issue necessary for preclusion to attach. To explore the issue properly, the Tribe needed, at the very least, a meaningful chance to explain in detail why no party to the 1868 Treaty would have understood that the mere creation of a national forest would terminate the hunting right. *See* pp.33-35, *supra*. Or to show how neither the post-1868 historical record nor the parties' ongoing practical construction of the Treaty supports that proposition. *See* pp.35-36, 40, *supra*. Or to demonstrate that nothing in President Cleveland's proclamation operated to extinguish Indian hunting rights—nor could it have, given the anti-abrogation language in the Forest Reserve Act. *See* pp.38-39, *supra*. But after having had no reason to advance these arguments in the district court (where the state never contended

that the forest's creation constituted "occupation"), the Tribe was afforded no "full and fair" opportunity to press them in limited reply briefing before the Tenth Circuit.[18] And the only remaining avenue to contest the issue—a petition for certiorari seeking discretionary review of a decision resting on multiple grounds—hardly filled the gap.

In short, it would stack one injustice upon another if application of the doctrine of issue preclusion now denied Petitioner the opportunity to address an issue that the Tribe never had a meaningful opportunity to address in the first place. The Court should thus reject the state's effort to exploit even further a one-sided victory that it did not fairly earn.

C. Applying Issue Preclusion Here Would Needlessly Implicate Unsettled Constitutional Questions.

Not only does declining to apply issue preclusion here fit comfortably within this Court's precedents; applying preclusion would require this Court to create new law that is both far-reaching and fraught with constitutional implications. The Court's "usual practice" of "avoid[ing] the unnecessary resolution of constitutional questions," *N.W. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009), further counsels against applying issue preclusion here.

To begin with, this Court has "often repeated the general rule that 'one is not bound by a judgment *in*

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[18] The limited briefing on this question in the Tenth Circuit also explains—and provides a further reason not to give preclusive effect to—the Tenth Circuit's erroneous resolution of the question as an alternative ground for its decision.

personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Taylor*, 553 U.S. at 893 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). Because this rule is "grounded in due process," *id.* at 901, and the right of a litigant to have "his own day in court," *Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996), the Court has emphasized the "importance of this rule" and accordingly takes a "'constrained approach to nonparty preclusion,'" binding nonparties to prior judgments only in "exceptional" circumstances, *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (quoting *Taylor*, 553 U.S. at 898).

There is no dispute in this case that Petitioner was not a party to the *Repsis* litigation; he was all of ten years old when Mr. Ten Bear and the Crow Tribe filed suit in 1992. The Wyoming District Court nevertheless concluded that Petitioner is "in privity with the Crow Tribe" such that Petitioner could be bound by *Repsis*. Pet.App.17. This Court, however, has never addressed the circumstances under which a member of an Indian tribe can be deemed in "privity" with his or her tribe. That question has wide-ranging practical consequences, but it also implicates the due process concerns that attend nonparty preclusion, as well as questions of tribal sovereign immunity given Wyoming's attempt to invoke preclusion against a party that it claims is no different from a sovereign tribe. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (describing tribal sovereign immunity); *cf. United States v. Mendoza*, 464 U.S. 154, 155 (1984) (holding that nonmutual offensive preclusion does not apply against federal government).

Next, applying preclusion here would require this Court to approve the use of offensive issue preclusion by a state against a criminal defendant—following a prior *civil* judgment, no less. This Court has repeatedly emphasized that issue preclusion, which "first developed" in civil litigation, has even less purchase in criminal cases. *Bravo-Fernandez*, 137 S. Ct. at 358. The Court has called for "guarded application of preclusion doctrine in criminal cases," *id.*, and just last Term, a plurality of this Court declined to "import" "issue preclusion principles in civil cases ... into the criminal law," *Currier v. Virginia*, 138 S. Ct. 2144, 2152 (2018) (plurality op.).

These admonishments, moreover, have come in the context of *defensive* issue preclusion—*i.e.*, a criminal defendant's attempt to preclude the state from invoking an earlier criminal judgment. This Court has taken an even more skeptical view of a state's attempt to employ *offensive* issue preclusion against a criminal defendant. For example, in *Simpson v. Florida*, 403 U.S. 384 (1971) (per curiam), the state court had held that petitioner's conviction at an earlier trial had preclusive effect at a subsequent criminal trial on another charge. *Id.* at 386. This Court dismissed that reasoning as "plainly not tenable." *Id.* And in *Currier*, a plurality expressed concerns that "grafting civil preclusion principles onto the criminal law" could allow "the government to invoke the doctrine to bar criminal defendants from relitigating issues decided against them in a prior trial." 138 S. Ct. at 2155 (plurality op.). Courts of appeals, furthermore, have explicitly rejected offensive issue preclusion in criminal proceedings. *See, e.g.*, *United States v. Gallardo-Mendez*, 150 F.3d

1240, 1246 (10th Cir. 1998); *United States v. Pelullo*, 14 F.3d 881, 889-96 (3d Cir. 1994); *United States v. Harnage*, 976 F.2d 633, 633-36 (11th Cir. 1992). Even more striking, the foregoing skepticism—and outright repudiation—of offensive preclusion in criminal cases arose in cases involving prior *criminal* judgments. This case, by contrast, involves a prior *civil* judgment.

Simply put, this Court has never come close to endorsing the proposition necessary to apply issue preclusion here: that a state may offensively preclude a defendant in a criminal prosecution from asserting his most meaningful defense because an underlying issue was determined several decades earlier in a civil suit in which the criminal defendant never participated. Given the palpable constitutional implications of such a rule, *see, e.g.*, *Gallardo-Mendez*, 150 F.3d at 1245-46, the Court should not—and need not—do so now, particularly after the state here failed to raise issue preclusion in the first place. *Cf. Arizona v. California*, 530 U.S. 392, 410 (2000) (noting that preclusion is "ordinarily lost if not timely raised").

Finally, applying issue preclusion here would not advance the policies underlying the doctrine. Issue preclusion is intended to reduce the "expense and vexation attending multiple lawsuits," "conserv[e] judicial resources," and "minimiz[e] the possibility of inconsistent decisions." *Taylor*, 553 U.S. at 892; *see also Standefer v. United States*, 447 U.S. 10, 21 (1980). But Petitioner has not brought a separate suit triggering "expense and vexation" or taxing "judicial resources"; he was criminally prosecuted by the state. And if this Court declined to address the merits of the decision below, the same "inconsistent decisions" that

presumably led this Court to grant certiorari will remain in place, *see* Pet.24-27; Reply.5-7; U.S. Cert. *Amicus* Br.15-18; n.13, *supra*, requiring further "judicial resources" to sort out the lingering uncertainty. That outcome has nothing to recommend it, further militating against applying issue preclusion.

* * *

The 1868 Treaty guaranteed to the Crow Tribe the continuing right to hunt on the "unoccupied lands of the United States." Neither the 1868 Treaty nor any act of Congress contains any suggestion that Wyoming's admission to the Union would abrogate the hunting right, and the mere creation of the Bighorn National Forest did not render that land "occupied" so as to abrogate the hunting right. The Wyoming District Court's atextual and ahistorical conclusion to the contrary has already produced one unjust criminal conviction and, if upheld, will undermine centuries-old treaty rights enjoyed by numerous other Indian tribes. Reversal is imperative.

CONCLUSION

The Court should reverse the judgment of the Wyoming District Court.

Respectfully submitted,

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